Case No. 11,884.

LOBBINS v. McDONALD.

{2 Lowell 140.}[1]

District Court, D. Massachusetts. Sept, 1872.

DEMURRAGE—OFFER TO RECEIVE ELSEWHERE.

Where a vessel was consigned to a certain wharf, which was full when she arrived, and the consignee offered to receive the cargo at an adjoining wharf, which was safe and suitable, but the master insisted on waiting until the first-mentioned wharf was unoccupied,—*held,* he could not recover demurrage in a court of admiralty for the time lost by waiting beyond what would have been lost if he had accepted the offer.

The libel propounded that the schooner Z. L. Adams, commanded by the libellant {W. E. Robbins}, took on board a cargo of three hundred and fifty-three tons of coal at Philadelphia, 29th November, 1871, for which a bill of lading was given, reciting that the vessel was bound to "the Lowell R. R. wharf, Boston, Mass.," and the delivery was to be at the aforesaid port of Boston, to the respondent {J: E. McDonald} or his assigns. Then followed the now usual clause, that, twenty-four hours after arrival and notice, there should be allowed, for receiving the cargo, at the rate of one day, Sundays excepted, for every hundred tons; after which there should be demurrage for every day, including Sundays; and the allegation was that the schooner was not fully unloaded until the twentieth day of December. The cause was heard on facts agreed. The schooner arrived December 4, and found the railroad wharf in Boston occupied by vessels, and lay until the 13th, when the respondent asked the master to haul to another wharf of the same company on the other bank of the river, within the limits of East Cambridge, which he refused to do. A few days later the wharf on the Boston side of the river was clear,

and the coal was landed there, and the freight was paid, and a certain sum was tendered for demurrage.

P. H. Hutchinson, for libellant.

We were not bound to go to East Cambridge. Our contract was to carry to the wharf of the company at Boston.

J. H. George and H. E. Morse, for respondent.

1. The wharf at East Cambridge is within the limits of the port of Boston; and an agreement to deliver at the wharf of the Lowell Railroad Company at Boston gave us the election to order the schooner to either wharf.

2. If we were bound to receive the coal only at the Boston side, yet our offer to take it at a suitable place equally convenient for the carrier ought to bar his damages, if he chose to decline the offer.

LOWELL, District Judge. No evidence of usage has been given, and no authorities have been cited to fix the limits of the port of Boston as a term of description in a bill of lading in the coasting trade; nor have I found it necessary to inquire carefully into that subject, because, admitting that the wharf of the Lowell Railroad Company at East Cambridge is not within those limits, and that the consignee had no right to order the schooner to that wharf under pain of not earning freight in case of a refusal; and admitting further, that the freight was already earned before December 13, I am of opinion that the master, coming into a court of admiralty for damages, ought to show that the wharf proposed to be substituted was one at which he could not safely or conveniently unload his cargo, for some reason. The situation of the parties was this on the 13th of December: The time allowed by the contract for receiving the cargo had expired; the master was not bound to wait longer; he might land his coal at some other wharf, at least after notice to the consignee, and would have earned his freight. If he did wait, the consignee was bound to pay so much a day;

and his assent to the waiting will usually be presumed. Now, suppose the master waits against the wish of the consignee, who has expressly authorized and required him to land the goods at another wharf, it seems to me that I could not interfere and say the master is entitled to wait until the wharf mentioned in the contract is free, against the expressed wish of the other party, at whose expense he is waiting. Suppose the consignee had sent lighters alongside, and offered to pay any additional expense that might come from discharging in that mode. Here a wharf, close at hand, safe and convenient, was offered him; and if it be divided by a political line from the port of Boston,—which I do not decide,—yet if no question of insurance or any other made a real difficulty, it seems to me he ought to have yielded, or, if not, that he cannot in this court recover the subsequent demurrage. The wharf was not named in the bill of lading for the benefit of the master, but for that of the consignee; and if, on the arrival of the cargo, it happens that the latter cannot avail himself of that wharf, I am by no means prepared to say he may not order delivery at another. My decision, however, does not turn upon this, but upon the ground that if the master unreasonably insisted upon what I assume to be a strict right, he ought not to expect damages in a court of admiralty, when the detention was from choice rather than necessity.

The evidence does not enable me to assess the damages, because it does not give the number of days that were spent after the thirteenth before the vessel was hauled in. Assuming that the time of actual unloading would be the same at both wharfs, there should be deducted from the eleven days for which demurrage is demanded only so many as the vessel lay idle after the offer was made. I understood it to be admitted that a tender was made of eight days' pay, and I 865 suppose this is about what is due, according to the rule above laid down. Interlocutory decree for

libellants. Damages to be assessed on the footing of this opinion. Question of costs reserved.

[1] {Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.)